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No. 82-1079

In the Supreme Court of the United States

OCTOBER TERM, 1982

FAIRLEIGH S. DICKINSON, JR., PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether "beneficial ownership" of securities within the meaning of Section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. (& Supp. V) 78m(d), a provision designed to protect shareholders by alerting them to possible shifts in corporate control, encompasses the power to commit shares to a plan for their disposition, or is limited to an economic interest in the securities or voting control.

2. Whether the evidence supports the district court's finding, upheld by the court of appeals, that petitioner reached an agreement with other individuals to act together for the purpose of disposing of shares beneficially owned by them, so that a group was formed within the meaning of Section 13(d)(3), 15 U.S.C. 78m(d)(3).

3. Whether a group of persons acting together to dispose of the stock held by the group members, and holding more than the percentage of stock that triggers the filing requirement, nevertheless need not make a filing under Section 13(d) if the group members do not acquire additional shares after the group's formation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 682 F.2d 355. The opinion of the district court (Pet. App. 35a-154a) is reported at 475 F. Supp. 783.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a) was entered on June 24, 1982. A petition for rehearing (Pet. App. 188a-189a) was denied on September 23, 1982. The petition for a writ of certiorari was filed on December 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Section 13(d)(1) of the Securities Exchange Act of 1934, 15 U.S.C. (Supp. V) 78m(d)(1), provides that, within 10 days after any "person" acquires beneficial ownership of more than 5% of a specified class of securities, a disclosure statement must be filed with the Securities and Exchange Commission and sent by that "person" to the company and to any exchange where the securities are traded. Section 13(d)(3), 15 U.S.C. 78m(d)(3), includes within the definition of the term "person," as used in Section 13(d), "two or more persons act[ing] as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer * * *." The Commission brought this enforcement action alleging, among other things, that petitioner had violated the disclosure provisions of Section 13(d) by failing to file a timely disclosure statement with the Commission after petitioner and several other shareholders of Becton, Dickinson & Company (BD), together holding more than 5% of the company's outstanding stock, agreed to act in concert for the purpose of disposing of those shares.

Following a four-week trial on liability, the United States District Court for the Southern District of New York found that petitioner and certain other defendants had failed to file the required statement disclosing their agreement or understanding to sell the BD shares under their control in an effort to induce a takeover of the company (Pet. App. 35a-154a). The Commission determined, however, not to seek any relief against petitioner other than the findings of

violation. The court of appeals affirmed (*id.* at 1a-34a).[1]

1. Petitioner is the son of a founder of BD and was one of its major shareholders, personally owning 802,138 shares (4.2%) of the company's outstanding common stock and serving as co-trustee of various family trusts holding 140,794 shares (.64%). Other family members, including petitioner's wife and daughter, held at least an additional 198,922 BD common shares (1%) (Pet. App. 5a).

In 1974 petitioner, who had personally managed BD for 25 years, relinquished management responsibilities to a team of handpicked successors and became chairman of the board (Pet. App. 5a, 54a). A rift subsequently developed between petitioner and BD's new management, and on April 20, 1977, the board of directors voted to oust petitioner from the chairmanship (*id.* at 57a). The next day, petitioner and his legal counsel met with representatives of Salomon Brothers (an investment banker and broker-dealer), its counsel, and two sympathetic BD directors to discuss the steps to be taken (*ibid.*). Petitioner decided to attempt to sell his shares to a company interested in a takeover of BD, and he engaged Salomon for this purpose (*id.* at 57a-58a).

Shortly after his April 21 meeting with Salomon, petitioner informed Robert Zeller, the chief executive officer and chairman of the board of F. Eberstadt &

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[1] Private parties had filed six complaints containing allegations similar to the Commission's, and the district court held a consolidated trial. The district court ruled that the private plaintiffs were not entitled to any monetary relief against petitioner on a number of grounds, including their failure to demonstrate that petitioner had caused their injury, and the court of appeals affirmed this aspect of the district court's holding as well. Pet. App. 29a, 155a-187a.

Company, Inc., another investment banker and broker-dealer which for many years had advised both BD and petitioner personally, of his intentions (Pet. App. 7a). At petitioner's suggestion, Eberstadt and Salomon agreed to work together. Eberstadt, through a subsidiary, F. Eberstadt & Co., Managers and Distributors, Inc. (M&D), served as investment adviser-manager to two mutual funds, the Chemical and the Surveyor Funds (the Funds), which collectively held 443,200 BD shares (2.33%). As adviser to the Funds, M&D made investment decisions on their behalf and, in addition, held and voted the proxies for the Funds' investment securities (*id.* at 20a, 25a-26a, 133a-136a). In addition, Eberstadt managed a number of discretionary trading accounts holding more than 52,000 BD shares (.27%). Thus, the combined Eberstadt interests totalled nearly 500,000 BD shares (2.6%) (*id.* at 20a, 62a).

Petitioner, Salomon, and Eberstadt launched a campaign to find a buyer interested in purchasing a substantial block of BD shares as a first step toward a takeover of the company (Pet. App. 60a). Beginning in April 1977 they discussed with individuals at various corporations the availability for purchase of a block of BD shares (*id.* at 59a-60a, 63a, 65a, 67a-69a). Petitioner personally participated in negotiations with at least three potential purchasers (*id.* at 8a, 60a, 63a-64a, 65a, 68a). The prospective purchaser generally was told of the availability of a block of shares, the description of the block ranging in size from approximately 9% to 20%, and of the extent of petitioner's BD holdings and those controlled by Eberstadt, by Dr. J.H. Fitzgerald Dunning, a BD director and close friend of petitioner,[2] and, at

[2] Dunning held 3200 shares individually, and three Dunning family trusts held 344,849 shares (collectively 1.8%). Dun-

the later stages of the campaign, by Dan W. Lufkin, a general partner in Edward L. Scarff & Company (*id.* at 61a, 63a-64a, 66a-67a, 69a).[3]

For example, in May 1977 petitioner and, subsequently, a Salomon partner contacted William Laporte, chairman of the board of American Home Products Corporation, to discuss the possible acquisition of the block of BD shares by American Home. Salomon informed Laporte that American Home could acquire 2.5 million BD shares, or 16% to 17%, including those of petitioner, Dunning, and the Chemical Fund (Pet. App. 9a n.7, 63a-64a). Similarly, in September 1977, petitioner met with representatives of the Monsanto Company and informed them that, in addition to the 1.2 million owned by his family, 1.3 million other BD shares held by friends and associates, including Dunning, were also for sale (*id.* at 9a, 66a). Monsanto's investment adviser testified that he left that meeting "with the 'clear understanding that the 500,000 shares that were owned by [the] * * * Fund[s] were part of the shares that were being talked about'" (*id.* at 66a; see *id.* at 62a n.17). Monsanto, however, like American Home, Hewlett-Packard, Pepsico, Bristol-Myers and Avon Products

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ning served as co-trustee of one of the trusts and each of his two brothers served as co-trustee of one of the other two trusts. The other co-trustee for the three trusts was Dunning's personal lawyer (Pet. App. 6a).

[3] Shortly after petitioner's meeting with Salomon, Lufkin had contacted Salomon to express concern regarding his investment in BD stock in light of petitioner's ouster. Lufkin's partnership held 93,000 BD shares in its own right and, in addition, provided investment advice to three individuals who collectively held 326,544 shares. The aggregate number of shares—419,544—represented 2.2% of the outstanding BD shares (Pet. App. 7a).

before it, rejected petitioner's proposal (*id.* at 63a-67a). Between October 1977 and late November 1977, overtures were also made to, and rejected by, Shering-Plough, Hoffman-LaRoche, Squibb, Ciba-Geigy and Warner-Lambert (*id.* at 66a-68a).

In late November and December 1977, representatives of Sun Company, Inc., met with Salomon partners, who informed them that a block of approximately 15% of BD's shares was available and that the block included 1.2 million shares held by petitioner, 500,000 owned by the Funds, 300,000 to 400,000 controlled by Dunning and 400,000 controlled by Lufkin (Pet. App. 10a, 69a-71a). On January 13, 1978, Sun's executive committee authorized an offer to purchase up to 34% of the outstanding BD shares, either at a flat price of $45 per share (about $12 more than the then current market price) or at a price of $40 with the right to receive the highest price subsequently paid to any other party (*id.* at 11a-15a, 73a-77a). That offer was presented to petitioner on January 14, through Salomon and Eberstadt; petitioner responded that he would accept the offer only if the same terms were extended to Dunning (*id.* at 12a, 80a-81a). Sun agreed to do so (*id.* at 13a, 80a-81a). On January 15 and 16, 1977, Sun presented its offer to purchase to Dunning, Eberstadt and Lufkin, all of whom also accepted (*id.* at 13a, 80a-83a).

2. The district court found it "clear" that petitioner "secured the services of Eberstadt and Salomon for the purpose of finding a corporation acceptable to him which would be interested in buying his substantial BD holdings and those of his friends as the foundation for a complete or partial takeover of BD" (Pet. App. 128a-129a). "Both the direct and circumstantial evidence," the court found, "compel the

conclusion" that petitioner, Eberstadt, M&D, Dunning and Lufkin "reached a common understanding to take concerted action" to offer a large enough block to interest a buyer and "to find a purchaser for their shares as a part of an effort to effectuate a shift in corporate control of BD" (*id.* at 137a-138a). The court found that petitioner had "personally engaged in the [sales] effort with [American Home], Monsanto and Squibb * * * kept Dunning abreast of what was going on * * * and * * * [with Salomon,] recruited Lufkin to join the group" (*id.* at 129a). In addition, the district court found that all of the corporate officials contacted were "assured of Dickinson's and Dunning's willingness to sell and of the availability of ½ million shares of the * * * Fund[s]" (*ibid.*).

The district court ruled that, for purposes of Section 13(d), which refers to "beneficial ownership" of securities, "a beneficial owner is one with the power to commit the shares to the group purpose of effectuating a shift in corporate control" (Pet. App. 133a). With respect to the shares owned by the Eberstadt-managed Funds and accounts, the court stated (*id.* at 135a-136a; citation omitted):

> Based on the reality of this transaction, it would indeed be substituting shadow for substance, and exalting form over substance, to hold that Eberstadt and M&D were not the beneficial owners of 495,375 shares of BD stock (constituted by Eberstadt's 52,175 BD shares in advisory accounts, 30,000 shares of the Surveyor Fund and 413,200 shares of the Chemical Fund) for purpose of combining them with other shares to effectuate a shift in corporate control.

The court's determination with respect to the Funds' shares was based on two factors—the ability of Eber-

stadt and M&D to commit the shares to the "package" (*id.* at 136a); and the ability of M&D to vote the shares (*ibid.*).

3. The court of appeals affirmed, stating that "[a]mple evidence supports the district court's findings that Dickinson, Eberstadt, * * * M&D, Lufkin, and Dunning 'were all part of a group formed to dispose of their shares to aid a third party acquisition of a controlling interest' " in BD (Pet. App. 18a, quoting *id.* at 137a). The court rejected petitioner's contention that the evidence failed to show either that he had entered into an agreement with any other person to dispose of his BD stock or that the members of the group had beneficial ownership of more than 5% of BD stock, sufficient to trigger the filing requirement (*id.* at 17a). The court agreed with the district court that the "power to commit the shares to the group purpose" (*id.* at 23a (emphasis omitted), quoting *id.* at 133a) is a sufficient determinant of "beneficial ownership," stating (*id.* at 23a-24a):

> A rule that beneficial ownership can be established only by proof of voting control would exclude from the coverage of Section 13(d) a range of conduct that Congress clearly intended should be covered. * * * The power to dispose of a block of securities represents a means for effecting changes in corporate control in addition to the possession of voting control.

The court of appeals found "clear[] support[]" for the district court's findings that the group members had the power to commit a sufficient number of shares to the group's purpose to meet the 5% trigger of Section 13(d) (Pet. App. 24a). The court of appeals noted that petitioner's counsel never objected, at trial, to counting the Eberstadt discretionary account shares toward the 5% requirement (*id.* at 25a).

With respect to the BD shares held by the Funds, the court of appeals found the evidence "convinc-[ing]" that "the [Funds'] directors routinely followed * * * M&D's recommendation in directing the disposition of the [BD] stock, which permitted * * * M&D to control the shares held by the Funds from the outset" (*id.* at 26a; footnote omitted). The court of appeals similarly agreed with the district court concerning Dunning's beneficial ownership, stating that "even the persons most familiar with the facts believed that Dunning had the authority to dispose of the trusts' shares" (*id.* at 27a). Finally, Lufkin himself testified that "when he was formally presented with Sun's offer, he felt confident he would be able to commit the [BD] shares held by the partnership and that [the three individuals advised by the partnership] would tender their [BD] stock as well" (*ibid.*).

Judge Van Graafeiland dissented. He stated: "My own reading of the record does not satisfy me that [petitioner], Eberstadt, Dunning, and Lukfin had the powers of disposition over stock owned by others which the district court found to exist" (Pet. App. 31a). The dissent therefore urged that it was impractical to require a Section 13(d) filing. Pet. App. 32a, 33a-34a.

ARGUMENT

1. Both courts below found that petitioner and his group had the power to commit more than 5% of BD stock to a plan of disposition. Pet. App. 24a-27a, 133a-136a. Petitioner nevertheless contends (Pet. 10-16) that he and his group did not have "beneficial ownership" within the meaning of Section 13(d) of more than 5% of the stock. Specifically, petitioner urges that only "voting control or some other form of economic interest" (Pet. 16) can constitute "beneficial ownership."

a. Even if the court of appeals had misinterpreted Section 13(d), as petitioner suggests, his claim would not merit review. The court of appeals interpreted the term "beneficial ownership" in the absence of any regulatory definition. But subsequent to the events involved in this case, the Commission promulgated a rule which defines the beneficial owner of a security to include one who

> directly or indirectly, through any * * * understanding, relationship, or otherwise has or shares * * * [i]nvestment power which includes the power to dispose, or to direct the disposition, of such security.

17 C.F.R. 240.13d-3(a) and (a)(1) (Pet. App. 196a); see Securities Exchange Act Release No. 13291, 42 Fed. Reg. 12351 (1977); Securities Exchange Act Release No. 13844, 42 Fed. Red. 41406 (1977).[4] Petitioner describes this defintion as "more concrete and objective than the rule which the [court of appeals] has created" (Pet. 16 n.**); petitioner's principal objection to the court of appeals' approach is that it is "subjective," "[v]ague[]," and "uncertain" (*id.* at 10-11), and he appears not to object to the Commission's rule. Whether or not petitioner is correct, future litigation in this area will focus on the Commission's rule, and the existence of that rule will require courts to make a materially different inquiry from that undertaken here by the court of appeals. See, *e.g.*, *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369-373 (1973); *Cana-*

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[4] The Commission is authorized by Sections 3(b) and 23 of the Securities Exchange Act, 15 U.S.C. 78c(b) and 78w, to define terms used in the Act and to promulgate rules "necessary or appropriate to implement" the provisions of the Act.

dian Pacific Enterprises v. *Krouse*, 506 F. Supp. 1192, 1197-1199 (S.D. Ohio 1981). Thus, as petitioner himself appears to acknowledge, this case does not present an issue that is likely to recur.

b. In addition, petitioner's group had voting control of more than 5% of BD stock. Thus, even if petitioner's "voting control" definition of beneficial ownership is accepted, he has still violated Section 13(d). The district court specifically found that Eberstadt[5] could vote the shares owned by the Funds; Eberstadt "at all times held the proxies to shares in the portfolios of the two funds [managed by it] and could vote those shares" (Pet. App. 136a).[6] Those shares alone, combined with petitioner's personal holdings, gave the group voting control over more than 5% of BD shares. Consequently, even if petitioner's contention were accepted, the outcome of this case would not be altered.

c. In any event, the court of appeals correctly held that the term "beneficial ownership" includes the power to commit securities to a plan for their disposition. As the court of appeals noted, "Section 13(d) was designed to alert investors in securities markets to potential changes in corporate control and to provide them with an opportunity to evaluate the effect of these potential changes" (Pet. App. 23a). The language of Section 13(d) expressly covers groups

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[5] Like petitioner, we use the term "Eberstadt" in the Argument portion of this brief to refer to both the parent company, Eberstadt, and its investment adviser subsidiary, M&D, unless otherwise specified.

[6] Petitioner's contention (Pet. 6) that it was undisputed that the group members did not have voting control over more than 5% of the shares of BD is therefore mistaken.

formed for the purpose of disposing of securities, as well as those formed to acquire or hold securities. By including disposition groups within the statutory filing requirement, Congress intended to alert an issuer's shareholders to the possibility that control of that company might shift as a result of an accumulation of shares in the hands of a group formed to dispose of them. See *GAF Corp.* v. *Milstein*, 453 F.2d 709, 717-718 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972).

If, as petitioner suggests, the power to commit shares to a sale or disposition is not sufficient to establish beneficial ownership, a group of persons with the power to dispose of even a majority of an issuer's securities could act together for that purpose in secret so long as the members of that group did not also possess other economic interests in those shares. That construction of the statute would clearly defeat Congress's purposes. Moreover, no such construction is required or even suggested by the language of Section 13(d); rather than some more narrow concept such as ownership or voting control, Congress chose the term "beneficial ownership," a concept broad enough to include any interest which would give a person the power to accomplish one of the purposes specified in the statute—acquiring, holding, or disposing.

Petitioner's assertions (Pet. 10-11) that shareholders will be unable to determine whether other persons have the power to commit securities to a plan for their disposition, and be unable to consult each other or to employ the services of an investment banker who is also an investment adviser, are plainly incorrect. Shares are aggregated for purposes of Section 13(d) only when their beneficial owners have *agreed* to act together for the purpose of acquiring, holding or dis-

posing of those shares. Section 13(d)(3), 15 U.S.C. 78m(d)(3); see Pet. App. 16a-17a, 128a, 136a-138a, 192a. A shareholder consulting another shareholder or engaging an investment banker need not be concerned with that person's power to commit shares to a plan of disposition, unless the two agree to act in concert to dispose of the shares they beneficially own. If shareholders reach such an agreement, it is hardly burdensome or unreasonable to require them to ascertain—in the unlikely event that they have not done so already—the number of shares that the parties to the agreement have the power to commit to their joint purpose.

2. Petitioner also asserts (Pet. 16; see *id.* at 5, 7, 17) that the court of appeals has made "amorphous" the concept of an agreement, which is a prerequisite to a finding that a group has been formed for purposes of Section 13(d). But this assertion is no more than a disagreement with the district court's and the court of appeals' conclusion that the evidence in this case showed that petitioner and the others "agreed to pool the shares of which they were beneficial owners and make them available * * * to a corporate purchaser interested in attempting a takeover" of BD, Pet. App. 136a; see *id.* at 18a ("Ample evidence supports the district court's finding that * * * an express or implied understanding existed between the group members * * *."). That factual conclusion, of course, does not warrant this Court's review.

Petitioner's contention that the court of appeals' approach will lead to shareholders' entering into agreements "unknowingly" (Pet. 5) is unsupported by anything petitioner says. For example, petitioner's claim that he was unaware of the precise extent to which other members of the group controlled shares of

stock (*id.* at 17) actually goes to the question, which we have already discussed, of the proper definition of "beneficial ownership" under Section 13(d). Petitioner's supposed ignorance about the extent of others' beneficial ownership cannot overcome the evidence, of which there was an abundance in this case, showing that petitioner and the other members of the group knowingly agreed to act together.[7]

Petitioner's specific efforts to dispute the facts found by the courts below are, in any event, unavailing. For example, petitioner argues (Pet. 17) that

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[7] Of course, the courts below, in deciding whether there was an agreement, were not confined to examining the explicit statements of members of the group. See generally *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960) ("Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."); *Herman & MacLean* v. *Huddleston*, No. 81-680 (Jan. 24, 1983), slip op. 15 n.30. Indeed, an agreement among shareholders to acquire, hold or dispose of stock often will not be formalized or documented in writing, and a court considering whether a group has been formed must draw inferences from the totality of circumstances. See *SEC* v. *Savoy Industries, Inc.*, 587 F.2d 1149, 1162-1163 (D.C. Cir. 1978), cert. denied, 440 U.S. 913 (1979); *GAF Corp.* v. *Milstein, supra*, 453 F.2d at 718; *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97, 110 (7th Cir. 1970).

Petitioner incorrectly asserts (Pet. 12) that the district court found that he "concluded that Eberstadt and M&D did not control the Funds' decision whether to sell or join a 13(d) group." We can find nothing in the district court's opinion supporting this statement. Petitioner cites the district court's recounting of conversations between Salomon's counsel and Eberstadt's chief executive officer and others concerning the influence Eberstadt had over the Funds' investment decisions (Pet. App. 62a-63a); but there is no indication that those discussions were communicated to petitioner or that he reached the conclusion that Eberstadt did not have the power to commit the Funds' BD shares to a plan for their disposition.

he could not have made an agreement with the independent directors of the Funds managed by Eberstadt, because he had no contacts with the directors. But the courts below did not infer an agreement between petitioner and the Funds' directors; rather, they found that there was an agreement between petitioner and the investment banker Eberstadt (Pet. App. 16a-18a, 126a, 128a). Because both courts also agreed that Eberstadt had beneficial ownership of the Funds' shares, they concluded that the group that included petitioner and Eberstadt had beneficial ownership of the BD shares belonging to the Funds.

3. Finally, petitioner contends (Pet. 18-22) that the filing requirement of Section 13(d) is not triggered by the creation of a group with beneficial ownership of the requisite 5% of stock, but rather comes into play only if a group member subsequently acquires additional shares. We note at the outset that, as with the question of the definition of beneficial ownership, the issue resolved by the court of appeals will not recur in the same form. The Commission has promulgated a rule defining "acquisition" for purposes of Section 13(d), which provides that a group "shall be deemed to have acquired beneficial ownership, * * * as of the date of [the] agreement [among the group members], of all equity securities of th[e] issuer beneficially owned by any such persons." 17 C.F.R. 240.13d-5(b)(1).[8] While the rule was not in effect at the time of the events involved

[8] The rule, originally promulgated in 1977, was designated as 17 C.F.R. 240.13d-6. Securities Exchange Act Release No. 13291, *supra*. The rule was amended in 1978 in respects not pertinent here and redesignated as 17 C.F.R. 240.13d-5. Securities Exchange Act Release No. 14692, 43 Fed. Reg. 18484 (1978).

in this case, it will govern future cases, and courts addressing the question raised by petitioner will have to consider the effect of this regulation. This is, therefore, an inappropriate case for this Court to review.

In any event, petitioner's argument is plainly inconsistent with the language, the legislative history, and the purposes of Section 13(d). For example, both the House Report and the Senate Report on Section 13(d) addressed this precise issue and explicitly approved the application of Section 13(d) to a group which does not acquire additional securities after its formation:

> [Section 13(d)] would prevent a group of persons who seek to pool their voting or other interests in the securities of an issuer from evading the provisions of the statute because no one individual owns more than [five] percent of the securities. *The group would be deemed to have become the beneficial owner, directly or indirectly, of more than [five] percent of a class of securities at the time they agreed to act in concert.* Consequently, *the group would be required to file* the information called for in section 13(d)(1) *within 10 days after they agree to act together, whether or not any member of the group had acquired any securities at that time.*

S. Rep. No. 550, 90th Cong., 1st Sess. 8 (1967) (emphasis added); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 8-9 (1968) (emphasis added). See *GAF Corp* v. *Milstein, supra*, 453 F.2d at 716-717.

Moreover, petitioner's argument cannot be reconciled with the language of Section 13(d). By virtue of Section 13(d)(3), the reporting requirement expressly applies to persons who act as a "group for the purpose of * * * disposing of," and not just "ac-

quiring," securities. But under petitioner's reading of the statute, a group which intended to dispose of its stockholdings could do so secretly, regardless of the extent of its beneficial ownership, provided that no member of the group acquired additional stock after the group's formation. Thus, contrary to the language chosen by Congress, Section 13(d) would apply to a disposition group only if it was in effect an acquisition group as well. Petitioner suggests no reason for believing that, contrary to every indication, this was Congress's intention.[9] Indeed, under petitioner's theory, an *individual* who acquired more than 5% of a corporation's stock in order to dispose of it would be subject to Section 13(d); but such an individual could avoid the reporting requirement simply by refraining from acquiring the stock himself and instead agreeing with those who controlled the stock on a planned disposition. Congress could not have intended this anomalous result.

Petitioner is incorrect in his assertion that the decision below conflicts with *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97 (7th Cir. 1970). The *Bath Industries* court specifically held that "once the group agrees to act in concert to acquire shares, its members must comply with the Act's disclosure requirements whether or not any one of them has at that time ac-

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[9] Petitioner's argument that the phrase "after acquiring" in Section 13(d)(1) requires the result he advocates (Pet. 19, 21-22), rests on a mechanical substitution of the term "group" for the term "person" in Section 13(d)(1), and fails to explain why the formation of the group should not be considered the "acquisition." The purpose of the "after acquiring" phrase is plainly to specify the event that triggers the obligation to file; when a group is involved, the formation of the group is that event, if its beneficially owned shares exceed the 5% threshold.

quired stock in furtherance of the underlying plan." *Id.* at 110 (emphasis omitted). Thus, *Bath Industries* requires a report under Section 13(d)(1) before any additional, post-formation acquisition by a member of a group formed for the purpose of acquiring shares. *Bath Industries* did not involve any allegation of an agreement to dispose of shares; the court therefore had no occasion to address the question, suggested by petitioner (Pet. I, 18), whether a group that agrees to act in concert to dispose of shares is subject to Section 13(d) at all. But in light of the explicit definition of Section 13(d)(3)—that any group formed "for the purpose of acquiring, holding, or disposing of securities" falls within Section 13(d)(1)—there is no reason to believe that the Seventh Circuit would disagree with the holding of the court below on this issue.[10]

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[10] The *Bath Industries* court did consider a post-formation acquisition by a member of a group significant for evidentiary purposes; such an acquisition, it ruled, would establish a "*rebuttable presumption* * * * that [the] purchase was made pursuant to an agreement of the group as of that date to acquire shares in furtherance of its objectives." 427 F.2d at 110 (emphasis in original). But while the court thus considered a post-formation acquisition sufficient (subject to rebuttal) to trigger the reporting requirement, it plainly did not consider it necessary.

Petitioner also repeatedly asserts (Pet. 4, 9, 13-14, 18, 22) that the result reached by the courts below will thwart the policy of neutrality which Congress sought to maintain between management and those seeking to change the control of an issuer. This argument is, of course, question-begging; the best evidence of the balance Congress intended to strike between management and dissidents is the language and purposes of Section 13(d). Petitioner's interpretation of that provision cannot be reconciled with the language of Section 13(d), and would allow dissident shareholders and others having the power to commit shares to a plan of disposition

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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to formulate such a plan in secret and shift large blocks of shares, even a majority, into the hands of another without alerting other shareholders. This sort of secret accumulation of shares and failure to alert investors to potential shifts in corporate control is precisely what Section 13(d) was designed to prevent.

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